UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PROFESSIONAL REFEREE ORGANIZATION, INC., Employer / Respondent, and PROFESSIONAL SOCCER REFEREES ASSOCIATION, Union / Petitioner.	NLRB Case No. 02-RC-281723

PETITIONER'S OPPOSITION TO EMPLOYER'S REQUEST FOR REVIEW

Lucas K. Middlebrook, Esq.
lmiddlebrook@ssmplaw.com
Karen L. Bernstein, Esq.
kbernstein@ssmplaw.com
SEHAM, SEHAM, MELTZ & PETERSEN, LLP
199 Main Street - Seventh Floor
White Plains, NY 10601
Tel: 914-997-1346
Fax: 914-997-7125

Attorneys for Petitioner
PROFESSIONAL SOCCER REFEREES ASSOCIATION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

OTHER

SUMMARY

A. Procedural Summary.

The Petitioner in this matter, the Professional Soccer Referees Association ("PSRA" or "Union" or "Petitioner") filed an RC Petition on August 20, 2021, for the following unit:

> Included: Soccer Officials designated by the employer, PRO, as Tiers A, B, and C Officials. ("Petitioned-For Officials").
>
> Excluded: Soccer Officials designated by the employer, PRO, as Tier D.[1]

The Respondent employer, Professional Referee Organization, Inc. ("PRO" or "Employer" or "Respondent") filed its Statement of Position on September 1, 2021 in which it advanced two arguments in support of its position that the Petitioned-For Officials are not statutory employees: (1) that the Petitioned-For Officials "have no economic relationship with PRO"; and (2) the Petitioned-For Officials "perform no services for, or on behalf of, PRO." (PRO SOP at 1). PSRA filed its Responsive Statement of Position on September 8, 2021.

Region 2 conducted a two-day hearing using the Zoom platform on September 15-16, 2021 over which Hearing Officer Joseph Luhrs presided. There was no dispute PRO, as the party alleging non-employee status, had the burden of proof in establishing its claims that the Petitioned-For Officials were not employees covered by the National Labor Relations Act ("NLRA" or "Act"). Yet, despite having that burden, PRO presented only a lone witness, General Manager Howard Webb, who was repeatedly unable to answer relevant questions posed to him and instead deferred to others within PRO who did not testify.[2]

- When asked about the creation of the tiers of officials, Mr. Webb responded: "I

[1] Petitioner and Respondent stipulated in the hearing that if the Petitioned-For Officials (PRO2 Tiers A-C) are found to be statutory employees, the Petitioned-For Unit is appropriate. (Tr. 9:23; 260:5-9).

[2] PRO, in its Request for Review, alleged the Regional Director "mischaracterized and improperly discredited the testimony of PRO **witnesses**…" (RFR at 2) (emphasis added). PRO seemingly forgot it presented only a single witness at the hearing prior to accusing the Regional Director of discrediting the multiple witnesses that never testified.

don't know exactly when the tiers were formed." (Tr. 96:2-7).

- When asked a series of questions regarding the PRO2 Committee, which serves to evaluate and decide upon promotions and demotions within the tiers (Tr. 97:20-98:4), and despite being the only witness presented by PRO, Mr. Webb once again was incompetent to discuss the subject matter at issue: "I don't know that I've ever -- maybe I attended one some time ago, but I don't make it a habit of attending those -- those meetings." (Tr. 97:9-11). Instead, Mr. Webb deferred to the chair of the PRO2 Committee, Mr. Alex Prus. (Tr. 97:9-13). Mr. Prus never testified.
- Mr. Webb was unsure how the Petitioned-For Officials were paid by PRO when working Major League Soccer ("MLS") matches, and again deferred a response to others within PRO: "I'm not certain how that money is paid directly to the official … I don't know if … one of my colleagues can establish that." (Tr. 106:4-8). None of these "colleagues" ever testified.
- When asked whether changes had been made to the process by which the Petitioned-For Officials were paid following PRO's denial of voluntary recognition, Mr. Webb responded with, "I don't know" and "I can't say either way." (Tr. 114:23-115:3).
- Mr. Webb was unable to competently answer questions regarding the timing of performance evaluations for the Petitioned-For Officials, once again deferring to "other people" that never testified: "I know what the timing is for the officials who work as part of the … bargaining unit. But I'm not sure of the time line [for PRO2 Officials]. Other people would be able to tell you that." (Tr. 69:18-70:13). Those "other people" never testified.

The parties filed post-hearing briefs on September 30, 2021, and thereafter, on October 20, 2021, the Regional Director issued a Decision and Direction of Election. ("DDE").

Pursuant thereto, a mail ballot election was held from October 29, 2021, to November 12, 2021. The election concluded and Region 2 conducted the tally via Zoom on November 30, 2021. The Petitioned-For Officials voted overwhelmingly in favor of unionization with sixty-eight (68) votes for PSRA, three (3) votes against unionization, and one (1) ballot void for lack of signature. However, PRO was unable to accept the democratic will of its employees and filed a specious Request for Review of the October 20 DDE less than forty-eight (48) hours before issuance of the certification in this matter.

PRO repeatedly complains in its Request for Review ("Request" or "RFR") that the Regional Director made "clearly erroneous factual determinations [and] mischaracterized the record testimony." (RFR at 12). However, PRO, as the party alleging non-employee status, which strips workers of all rights under federal labor law, had the burden of proof in establishing that claim. *E.g.*, *BKN, Inc.*, 333 NLRB 143, 144 (2001). Moreover, Board precedent provides that "particular caution" must be exercised before concluding that workers fall into one of the exceptions to employee status contained in the Act. *See Beverly Enters.-Mass., Inc.*, 165 F.3d 960, 963 (D.C. Cir. 1999). PRO had the burden but chose to present a single witness who was unable to answer certain questions and repeatedly deferred to his colleagues -- all of whom never testified. Yet, instead of recognizing its evidentiary shortcomings, PRO has chosen to wrongly accuse the Regional Director of making "clearly erroneous factual determinations." (RFR at 12).

B. <u>Summary in Opposition to PRO's Request for Review.</u>

As set forth at the outset of Petitioner's post-hearing brief in this matter, the modest goal of the Petitioned-For Officials was to "have the opportunity to negotiate over their terms and conditions of employment." (PSRA Post-Hearing Brief at 1). The Petitioned-For Officials demonstrated overwhelmingly, with a tally of 68-3, their desire to be represented by PSRA for purposes of collective bargaining. Yet, in response to its employees' overwhelming support for unionization, PRO threw a temper tantrum and filed a Request for Review in which it disrespected the Petitioned-For Officials, levied attacks at Region 2's Regional Director, misrepresented the established record, alleged facts that were not timely presented to the Regional Director in violation of 29 CFR § 102.67(e), and hurled a refusal to bargain threat at both PSRA and the Board. Simply put, PRO's Request raises no compelling reasons to grant review. And not only did PRO woefully fail to satisfy the "compelling reasons" standard necessary under NLRB Rules to support review, but the disrespectful tone of the Request, including referring to its own employees as

"students" that should focus on their "homework", demonstrates precisely why these employees petitioned and voted in favor of unionization.

29 CFR § 102.67(d) requires "compelling reasons" to exist before the Board will grant review of a Regional Director's DDE:

> (d) ***Grounds for review***. The Board will grant a request for review only where compelling reasons exist therefor. Accordingly, a request for review may be granted only upon one or more of the following grounds:
>
> (1) That a substantial question of law or policy is raised because of:
>
> (i) The absence of; or
>
> (ii) A departure from, officially reported Board precedent.
>
> (2) That the Regional Director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.
>
> (3) That the conduct of any hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.
>
> (4) That there are compelling reasons for reconsideration of an important Board rule or policy.

PRO argues the Board should grant its Request for Review based on three questionable arguments, none of which present "compelling reasons."

PRO first argues the Board should reconsider and reverse its existing precedent upon which the DDE relied, *Pa. Interscholastic Athletic Ass'n*, 365 NLRB No. 107 (2017) ("*PIAA*"), *enf. denied* 926 F.3d 837 (D.C. Cir. 2019) ("*Interscholastic*"). That this is PRO's lead argument in favor of review speaks volumes. PRO does not argue, as §102.67(d) requires, that a substantial question of law or policy is raised because of the *absence of or a departure from Board precedent*. Instead, PRO recognizes the Regional Director followed the existing *PIAA* precedent, but because that precedent did not favor its position, PRO contends the Board should grant its Request for Review and "reverse *PIAA*…" (RFR at 1). Yet, even PRO seemed unsure of its extraordinary request for the Board to reverse existing precedent as it was conveyed in confusing fashion with use of a double negative:

> For its entire history, the Board has *never* held that the Act was *not* intended to apply to relationships that are primarily developmental and education-based rather than economic in nature. It should reaffirm that principle…

(RFR at 1). The main point upon which PRO bases its request for the Board to reverse *PIAA* is the D.C. Circuit's denial of enforcement. (RFR at 15-22) (citing *Pa. Interscholastic Athletic Ass'n, Inc. v. NLRB*, 926 F.3d 837 (D.C. Cir. 2019) ("*Interscholastic*")). However, it is well settled that each Region is obliged to follow existing Board precedent until such time as either the United States Supreme Court or the Board itself overturns the precedent, and neither of those two has occurred here. *See, e.g., Nielsen Lithographing Co. v. NLRB*, 854 F.2d 1063, 1066-1067 (7th Cir. 1998); *Beverly Health and Rehabilitation Services Inc.*, 332 NLRB 347, 356, fn. 21 (2000); *Painters Local Union No. 64*, 273 NLRB 13, 17 (1984).

Recognizing the extreme nature of its *PIAA* reversal request, PRO argued that, as an alternative, the DDE "cannot stand because it is founded on a number of clearly erroneous factual findings, and it improperly extends *PIAA* well beyond any reasonable limitations." (RFR at 1). Unfortunately for PRO, simply saying something does not make it so.

The Regional Director did not make any of the erroneous factual findings alleged by PRO. The Regional Director correctly relied upon the record established during the hearing. PRO, however, did not. PRO's Request for Review contains several factual misrepresentations, outright falsehoods, and citations to facts that were not timely cited to the Regional Director. Moreover, in recognition of the slim reed upon which its *PIAA* reversal argument leans, PRO makes an alternative *PIAA* argument, which ventures into the land of confusion. In one breath, PRO argues the Board should grant its Request for Review and reverse *PIAA*. Yet, in nearly its next breath, PRO relies upon *PIAA* to contend that the Regional Director "extend[ed] [it] well beyond any reasonable limitations." (RFR at 1). PRO's spaghetti-at-the-wall approach here has created

inconsistent arguments. PRO first alleges *PIAA* and this case contain the "same material facts." (RFR at 27). Yet, in an attempt to bolster its secondary argument that the Regional Director improperly extended *PIAA* to the present matter, PRO flip flops and argues "there are many significant factual differences between the soccer officials in PRO and the lacrosse officials in *PIAA*." (RFR at 1).

It is clear PRO is unhappy the Petitioned-For Officials sought to unionize and achieved representation in accordance with the NLRA and existing Board precedent. It is also clear this unhappiness has prompted PRO to advance erroneous legal arguments designed to stymie its employees' exercise of their lawful rights under the Act - especially since its Request was only filed *after* the tally demonstrated overwhelming support for PSRA. In addition, PRO outwardly threatened both the Board and PSRA with a refusal to bargain if its legal position was not adopted.

> [I]f the Board refuses to reverse PIAA and continues to improperly weigh the independent contractor factors according to *FedEx I*, *FedEx II*, and *PIAA*, PRO will refuse to bargain and appeal the Board's reasoning to the D.C. Circuit who will, once again, state that the Board cannot effectively nullify the D.C. Circuit's decisions by asking a fourth panel of the D.C. Circuit to apply the same law to the same material facts but give a different answer to the same fundamental question.

(RFR at 27). PRO's lack of respect for the Board and its processes is astounding. Nevertheless, the certification in this matter was issued by Region 2 on December 8, 2021; and as the Board has long held, certification is effective when issued. "Under well-established law, an employer is not relieved of its obligation to bargain with a certified representative of its employees pending Board consideration of a request for review." *Audio Visual Services Group, Inc*., 365 NLRB No. 84, at *5 (2017) (citing *Benchmark Industries*, 262 NLRB 247, 248 (1982), *enfd. mem.* 724 F.2d 974 (5th Cir. 1984)). Therefore, if PRO intends to rely on its filing of a Request for Review in refusing to bargain with PSRA, it does so "at its peril*." Id.* (citing *Allstate Insurance Co*., 234 NLRB 193, 193 (1978)).

ARGUMENT

A. PRO is Barred from Raising Issues or Alleging Facts Not Timely Presented to the Regional Director.

The federal regulations are clear regarding the contents of a request for review of Regional Director actions: "Such request may ***not*** raise any issue or allege any facts not timely presented to the Regional Director." 29 CFR 102.67(e) (emphasis added). As to PRO's attempts to introduce issues and allege facts that were not timely presented to the Regional Director, those issues and alleged facts should be barred from consideration in both a Request for Review and any subsequent proceeding before the Board.

1. PRO, for the First Time, Raises the Issue of the Number of Hours Worked and Asserts Related Alleged Facts.

PRO argues that "PRO2 officials do not perform full time (or even part-time) levels of work." (RFR at 35). PRO offers "a reasonable estimate" of the number of hours that the Petitioned-For Officials spend participating in "PRO2 assignments" at about 216 hours per year. (*Id.*); *see also,* (RFR at n. 30). However, at the hearing, there was scant evidence presented regarding the number of hours the Petitioned-For Officials spent participating in PRO2 assignments. Neither party addressed the number of hours worked in their post-hearing briefs. Nor is there any indication the Regional Director considered the issue or related facts in his determination or written DDE. Therefore, this issue and any related alleged facts should not be considered by the Board.

In the event the Board does consider the issue of hours worked by the Petitioned-For Officials and any related alleged facts, PSRA should be afforded an opportunity to address the issue and rebut PRO's new factual estimate. For example, PRO does not include in its estimate:

- Travel time to and from match cities.
- The requirement that officials arrive in the venue city between several hours before kickoff to the night before, depending on method of travel and number of time zones crossed. (PX-5-002); (PX-6-002).

- The requirement that officials arrive for matches 90 minutes prior to kickoff. (*Id.*).

2. PRO, for the First Time, Raises the Issue of the Petitioned-For Officials' Personal Motivations and Asserts Related Alleged Facts.

PRO states: "Officials' participation is clearly personally motivated — specifically, to ultimately have the opportunity to officiate in MLS, the ultimate level of professional match officiating in the United States (or beyond, internationally)." (RFR at 30). However, at the hearing, no evidence regarding the Petitioned-For Officials' personal motivations was solicited by either party. Neither party addressed the issue in their post-hearing briefs. Nor is there any indication the Regional Director considered the issue or related facts in his determination. Therefore, this issue and any related alleged facts should not be considered by the Board.

In the event the Board does consider the issue of the Petitioned-For Officials' personal motivations and any related alleged facts, PSRA should be afforded an opportunity to address the issue and rebut PRO's newly presented evidence regarding the Petitioned-For Officials alleged personal motivation.

B. PRO Misrepresents the Facts with False Conclusory Statements, Asserts Falsehoods, Mischaracterizes the Record, and Continuously Contradicts Itself.

1. PRO Misrepresents the Facts with False Conclusory Statements.

In a list purported to include "factual differences between the soccer officials in PRO and the lacrosse officials in *PIAA*", PRO misrepresents the facts with false conclusory statements.

> For example: (i) PRO does not set fitness …or work standards; (ii) PRO does not provide the instrumentalities, [or] tools … for officials; (iii) PRO … has no direct economic relationship with officials, merely a developmental one; (iv) PRO has not effectively limited officials' realistic ability to work as a soccer referee for other leagues; … and (vi) PRO has no control over officials' on-field performance. … the PRO officials participate in PRO as a non-essential component of their referee training, do not officiate under PRO's direction or control, and do not receive compensation for those developmental endeavors.

(RFR at 1-2). However, not only does the record contradict Respondent's position, but PRO itself *discusses and admits* to facts that show the opposite.

PRO mistakenly claimed it "does not set fitness … standards." (RFR at 1). However, the record shows the opposite. The only fitness requirements for FIFA and USSF is to pass an annual fitness test to be eligible to officiate. PRO alone implements ongoing fitness standards by which the Petitioned-For Officials must comply with an ongoing fitness plan, track their workouts, and monitor and report fitness data to PRO. Moreover, PRO maintains a specific COVID-19 policy. (*See* Section D.1 – health and fitness, *infra*).

PRO mistakenly claimed it "does not set … work standards" (RFR at 1) and that the Petitioned-For Officials "do not officiate under PRO's direction or control." (RFR at 2). However, the record shows the opposite. PRO establishes multiple work standards regarding education, training, health and fitness, travel, match day protocols and procedures, evaluations and assessments, and employee discipline. (*See* Section D.1, *infra*).

PRO mistakenly claimed it "does not provide the instrumentalities [or] tools" for Petitioned-For Officials. (RFR at 1). PRO also asserts that "PRO2 officials are responsible for purchasing *all* uniforms and equipment." (RFR at 7). However, the record shows the opposite and PRO *admits* in its Request for Review that it provides certain uniforms and equipment to the Petitioned-For Officials. (RFR at 8-9 – polo shirts, tracksuits, uniforms for MLS matches, PRO2 patch, GPS heart-rate monitoring watches, communications devices). (*See* Section D.4, *infra*).

PRO mistakenly claimed it "has no direct economic relationship with [the Petitioned-For Officials], merely a developmental one." (RFR at 1-2). However, the record shows the opposite. Examples of the economic relationship between PRO and the Petitioned-For Officials includes the procurement of instrumentalities and tools to the Petitioned-For Officials (*see* above and Section

D.4, *infra*); PRO's involvement in coordinating the payment of match fees and travel expenses, advocating for pay rates, and involvement in pay disputes[3] (*see* Section D.6, *infra*); and the fact that the Petitioned-For Officials' work is core to PRO's existence. (*See* Section D.7, *infra*).

PRO mistakenly claimed it "has not effectively limited [Petitioned-For Officials'] realistic ability to work as a soccer referee for other leagues." (RFR at 2). Similarly, PRO also states, "PRO2 officials can and do sell their skills on the open market, both in professional leagues (whether affiliated with PRO, like the USL, or not), and in collegiate, regional, and other leagues." (RFR at 34). However, the record shows the opposite. Petitioned-For Officials do not feel free to officiate other matches without PRO's approval. (Tr. 133:11). PRO's 72-hour scheduling restriction surrounding the time period of a PRO match assignment further impedes the Petitioned-For Officials' ability to work other matches. (Tr. 134:3-7); *see also* (PX-5-002); (PX-6-002). (*See also*, Section D.9, *infra*). Furthermore, PRO's statement regarding the Petitioned-For Officials' ability to sell their skills on the open market is grossly overstated. PRO admits it assigns officials to nearly eighty percent (80%) of USL matches and one hundred percent (100%) of NWSL matches. (RFR at 7). The truth is, officials have virtually no access to USL or NWSL matches without working for PRO. Furthermore, while PRO asserts there are "[s]everal professional soccer leagues … in the United States" (RFR at 5), the only other professional-level soccer league in the United States besides USL and NWSL is the National Independent Soccer Association (NISA), for which PRO does not assign. NISA has only ten (10) teams. In contrast, PRO assigns to leagues with approximately seventy-five (75) teams.

[3] PRO's argument that this factor does not evidence an economic relationship because "not all PRO2 officials will have disputes over payment" is laughable. (RFR at 29). The number of actual disputes is irrelevant to the fact of how disputes are handled when they do arise.

PRO mistakenly claimed it "has no control over [Petitioned-For Officials'] on-field performance" and the Petitioned-For Officials "do not officiate under PRO's direction or control." (RFR at 2). However, the record shows the opposite. While the Petitioned-For Officials are not directly supervised while officiating matches on the field, there are mechanisms in place whereby they are instructed in the laws of the game ("LOTG") and held accountable to PRO for their on-field performance, including post-match reporting, performance assessments, required self-evaluations, post-match webinars, and mid- and end-of-season performance reviews. (*See* Section D.1 – education, training, match day protocols and procedures, evaluations and assessments, and employee discipline, *infra*).

2. PRO Asserts Falsehoods, Mischaracterizes the Record, and Continuously Contradicts Itself.

First, PRO mischaracterizes the facts surrounding the creation of PRO and PRO2. Regarding PRO, it states:

> Coinciding with the establishment and/or expansion of these professional soccer leagues [MLS, NWSL, and USL], PRO initially decided to create a vehicle for the professionalization of officials. Accordingly, PRO established a salaried, professional referee group for MLS matches.

(RFR at 5)(citations omitted). Regarding PRO2, it states:

> In 2015, a few years after the creation of PRO, management determined that it needed to create a developmental pipeline for professional officiating. Thus, PRO established PRO2 …

(*Id.*). However, PRO omits the reason behind the necessity for the creation of such an entity: because the various leagues and teams are prohibited by soccer's governing body, FIFA, from directly employing the Petitioned-For Officials.[4]

[4] PRO admitted to this in its Statement of Position: "The reason for PRO's creation was to comply with FIFA's global rules, which prohibit officials from being employed directly by leagues…" (Rider to Respondent SOP at 1).

Second, PRO frequently describes the Petitioned-For Officials as "volunteers" and "unpaid staff." At one point, PRO even purports: "If anything, PRO provides services exclusively to PRO2 officials." (RFR at 28). However, the plain meaning of the words "volunteer" and "unpaid" demonstrate the Petitioned-For Officials are neither; and the plain meaning of the word "services" demonstrates that the Petitioned-For Officials indisputably provide services to PRO. "Volunteer" is defined as "a person who voluntarily undertakes or expresses a willingness to undertake a service, such as … one who renders a service or takes part in a transaction while having no legal concern or interest."[5] PRO offers no evidence, nor is there any in the record, to support the conclusion that the Petitioned-For Officials have no legal concern or interest relating to their work as soccer officials. "Unpaid" is defined as "not paid."[6] The record demonstrates, and PRO *admits*, that the Petitioned-For Officials are indeed paid.[7] In fact, PRO's lone witness testified in a manner that directly contradicts PRO's argument that the Petitioned-For Officials are simply volunteers:

> But the idea of the organization, as I said, was to create this vehicle for the professionalization of [soccer] officials. In other words, and **officials would get paid to do the role of officiating**, not just from -- from officiating the games, but beyond that, in the way that players receive salaries for being players on rosters without playing games. So PRO was set up with that intention.

(Tr. 31:4-10) (emphasis added).

Third, PRO continuously asserts it does not develop or institute its own policies, procedures, and standards; or monitor or enforce compliance with any policies, procedures, or standards. PRO maintains it merely "communicate[s] the league policies and procedures to

---

[5] https://www.merriam-webster.com/, last accessed December 14, 2021.

[6] https://www.merriam-webster.com/, last accessed December 14, 2021.

[7] PRO pays the Petitioned-For Officials directly for MLS matches worked. (Tr. 53:15, 53:25, 118:10). For non-MLS matches, the Petitioned-For Officials submit invoices directly to PRO and get paid through ArbiterPay. (Tr 105:23); (Tr 161:1). Although sometimes payment is not directly made by PRO or PRO2, that does not change the fact the Petitioned-For Officials are indeed paid.

officials as part of its assignment duties." (RFR at 7); *see also* (RFR at 8 - "The leagues, and *not* PRO, establish handbooks, travel policies…"); (RFR at 31 - "Further, PRO2 does not develop, implement, or enforce administrative rules regarding its participating officials — the leagues do."); (RFR at 32: PRO "does not … establish rules or policies, or monitor or enforce administrative compliance."). However, PRO contradicts itself in the same paragraph by first stating "it does not monitor and determine compliance with league policy", but then stating: "Importantly, PRO may use an official's failure to follow league procedure … as a reason to refuse to promote and/or demote among PRO's tiers." (RFR at 8). Indeed, the record demonstrates that PRO establishes multiple work standards regarding education, training, health and fitness, travel, match day protocols and procedures, and evaluations and assessments; monitors and enforces compliance with such policies, procedures, and standards; determines demotions and promotions based on compliance with such policies, procedures, and standards; and issues discipline for violation of such policies procedures, and standards. (*See* Section D.1, *infra*).

Fourth, PRO consistently compares the Petitioned-For Officials to students completing homework and describes their programs as developmental and educational. At the same time, PRO *admits* that if the Petitioned-For Officials do not "complete their homework" and participate in the developmental and educational programs offered, they will not advance in their careers: "Like at any school, if a student does not perform the homework, they will not progress to the next level, and PRO2's developmental program is no different." (RFR at 11).

Fifth, PRO asserts that "PRO2 participants are expected to have full-time outside employment." (RFR at 6). PRO refers to two (2) of Petitioner's witnesses at the hearing who hold other employment: Matthew Franz, PRO2 Tier C Referee and software engineer; and Thomas Felice, Tier B Assistant Referee and media freelancer. (RFR at 3). However, just because these

two (2) individuals maintain other means of income does not mean *all* Petitioned-For Officials hold other, similar employment. Nor was any evidence presented at the hearing to suggest that PRO "expects" all Petitioned-For Officials to hold outside employment; PRO simply asserts this in its Request unsupported by the record evidence.

C. *PIAA* Should Not Be Reconsidered or Reversed.

PRO argues its Request for Review should be granted because there "are compelling reasons for the Board to reconsider and Reverse *PIAA*." (RFR at 15). *PIAA* constitutes existing Board precedent, but PRO makes no argument (nor could it) that a substantial question of law or policy is raised because of the absence or departure from Board precedent as is required by 29 CFR §102.67(d)(1). Instead, PRO seems to argue that the *PIAA* Board precedent is akin to "an important Board rule or policy" and that pursuant to 29 CFR §102.67(d)(4), there are compelling reasons for reconsideration. Yet, aside from labeling such reasons "compelling", PRO failed to present even a lone basis sufficient to meet what the Board has described as "the stringent requirements of Section 102.67 … governing a grant of review." *St. Barnabas Hospital & Committee of Interns & Residents*, 355 NLRB 233 (2010). Instead, PRO merely advances a self-serving argument that the Board in *PIAA* "improperly rested its decision on the common law definition of employee and rejected the relevance and centrality of the fundamentally developmental/educational relationship between PRO2 officials and the Company." (RFR at 15).[8] However, despite this pronouncement, PRO's actual argument in support of *PIAA* reversal is that the Board "improperly weigh[ed] the ten Restatement factors identifying independent contractor

[8] The Board in *PIAA* would have had no occasion to analyze the "relationship between PRO2 officials and the Company." (RFR at 15). PRO appears to have conflated the Board's decision in *PIAA* with Region 2's DDE in the present matter. Errors of this nature, which are common throughout Respondent's Request for Review, make it difficult to discern exactly what PRO is arguing.

status." (RFR at 16). However, it is well settled that the "determination of whether an individual is an independent contractor is quite fact-intensive." *Argix Direct, Inc*., 343 NLRB 1017, 1020 (2004). And as such, "each case raising employee-status issues must be decided on its own facts." *PIAA* at *43. PRO disagrees with the Board's fact-specific employee-status analysis found in *PIAA*. But, such a factually-driven disagreement is hardly a basis, let alone a compelling reason, to reconsider and reverse *PIAA*, which was properly decided in accordance with the NLRA and relevant Board precedent.

In determining statutory employee status as required by Section 2(3) of the Act, the Regional Director was bound to and correctly applied relevant NLRB precedent. The prior precedent was *FedEx Home Delivery*, which applied the common-law test to determine employee status and "more clearly define[d] the analytical significance of a putative independent contractor's entrepreneurial opportunity for gain or loss." *SuperShuttle DFW, Inc.* 367 NLRB 75 (2019) ("*SuperShuttle*"), citing *FedEx Home Delivery*, 361 NLRB 610 (2014) ("*FedEx*"), *enf. denied* 849 F.3d 1123 (D.C. Cir. 2017) ("*FedEx II*"). The Board's *SuperShuttle* decision overruled *FedEx* as pertaining to entrepreneurial opportunity and emphasized entrepreneurial opportunity *as part* of the common-law agency test. *Id*. However, the common-law agency test remains, and the Employer still maintains the burden to prove independent contractor status. *Id*.

SuperShuttle points to other relevant case law for the industry concerned; *PIAA* and *Big East* represent Board opinions specific to the sports officiating industry. *Pa. Interscholastic Athletic Ass'n*, 365 NLRB 107 (2017) ("*PIAA*"), *enf. denied* 926 F.3d 837 (D.C. Cir. 2019) ("*Interscholastic*"); *Big East Conf.*, 282 NLRB 335 (1986) ("*Big East*"). It is important to note the Board agreed with the Regional Director in *PIAA* that *Big East* was not controlling on *PIAA*

because *Big East* predated *FedEx* and even *Roadway Package System*.[9] *PIAA*, 365 NLRB 107. Notably, what *was* recognized by the Board in *PIAA* was that there continues to be no categorical pronouncement by the Board that sports officials are independent contractors. *Id*. What is left then for controlling industry-relevant law is *PIAA*, the case of high school lacrosse referees from Pennsylvania for whom the Regional Director and Board ordered a representation election. The Regional Director relied on the common-law test as it was interpreted at the time – using *FedEx* (without the emphasis on entrepreneurial opportunity). *Id*.

Subsequently, the D.C. Circuit Court of Appeals declined enforcement of the Board's decision in *PIAA* for two reasons. First, the D.C. Circuit cited the "few times which PIAA actually pays Officials," referring to the frequency of payment and the seventh factor in the common-law test. *Pa. Interscholastic Athletic Ass'n, Inc. v. NLRB*, 926 F.3d 837, 840 (D.C. Cir. 2019) ("*Interscholastic*"). Second, the D.C. Circuit, in reference to the sixth factor, pointed to the relative short length of the high school lacrosse officiating season, which was four months. *Id* at 841. It is important to recognize that the common-law test was not rejected by the D.C. Circuit, but rather it was the fact-based analysis of two of the ten factors that the court analyzed and weighed heavily in deciding not to enforce the Board's decision.

Accordingly, *PIAA* was correctly analyzed by the Board applying the appropriate legal framework to a unique set of facts. Therefore, PRO has advanced no compelling reason for the Board to reconsider its holding in *PIAA*, let alone in the context of this matter.

[9] *Roadway Package System*, decided in 1998, represented a major shift in independent contractor law under the Act. *Roadway Package System*, 326 NLRB 842 (1998); *see PIAA*, 365 NLRB No. 107 (2017).

D. The Regional Director Properly Concluded the Petitioned-For Officials Are Employees of PRO.

The Regional Director properly concluded the Petitioned-For Officials are employees of PRO and took a conservative approach in doing so by determining certain factors were inconclusive when such factors could have been found to militate in favor of employee status. The Regional Director correctly adhered to Section 2(3) of the Act, which contains a broad definition of "employee." 29 U.S.C. § 152(3). In *NLRB v. United Ins. Co.*, the Supreme Court held that the "obvious purpose" of the independent-contractor exception was to have the Board and the courts apply "general agency principles" in distinguishing between the two types of workers. 390 U.S. 254, 256 (1968). The Supreme Court has endorsed the non-exhaustive list of factors contained in the Restatement (Second) of Agency and has emphasized that under the common-law test "there is no shorthand formula"—instead, "all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Id.* at 258; *see Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 752 & n.31 (1989). The Regional Director properly assessed all the incidents of the employment relationship as developed in the record.

1. The Regional Director Correctly Determined that the Extent of Control Factor Supported a Finding that the Officials Are Employees.

The record readily demonstrated, and the Regional Director properly determined that PRO's control over the Petitioned-For Officials support a finding of employee status. Indeed, the only logo that appears on the Tier "Expectations & Opportunities" publication for Referees (PX-2) and Assistant Referees (PX-20; PX-37) is the PRO2 logo.

PRO controls recruitment. The Petitioned-For Officials are recruited by PRO staff. (Tr. 128:21; 130:3); (Tr. 206:8; 203:20-204:2). Moreover, the Petitioned-For Officials are assigned "scouts" and "endorsers" by PRO. (PX-48-010). PRO2 then decides in which tier an official is

classified (Tr. 97:3), as well as subsequent promotions and demotions within the tiers. (Tr. 97:16, 122:2, 227:10).

PRO controls education. PRO Coaches continually monitor job performance (Tr. 98:22) and provide suggestions to the Petitioned-For Officials for job improvement. (Tr. 99:1). Moreover, PRO provides instructions to the Petitioned-For Officials on various soccer officiating mechanics, including positioning on the field (Tr. 99:18), while also providing *specific direction* to the Petitioned-For Officials on how to recognize and adjudicate certain types of fouls that occur during the matches for which they are assigned. (Tr. 100:12). Furthermore, PRO requires the Petitioned-For Officials to attend monthly webinars[10] (Tr. 147:14; 148:8; 214:11) and provides them with written presentations that outline expectations and preferred methods of completing their work as well as specific guidance on how to interpret FIFA laws. (Tr. 168:4; 186:20). There is no evidence in the record, nor does PRO assert, that the Leagues have any role in the education of the Petitioned-For Officials.

PRO controls training. PRO requires the Petitioned-For Officials to attend scheduled training. (Tr. 143:6; 211:15). To this end, the Respondent requires the Petitioned-For Officials to attend pre-season training camps. (Tr. 143:9; 211:18). PRO's own documents outline training expectations of the Petitioned-For Officials. (PX-2); (PX-4 - "Complete post training and training sessions after match"); (PX-20); (PX-37).

PRO controls health and fitness. The Petitioned-For Officials are "required [by FIFA

[10] Compliance with attendance at these webinars is monitored and considered in mid-year and end-of-year evaluations. (PX-16-11); (PX-19-08). Thus, PRO's assertion that participation in education is voluntary "homework" falls flat. PRO even *admits* that continued participation in PRO2 depends, in part, on an individual's "overall level of involvement in the development program." (RFR at 35). Moreover, when considering promotions to higher Tiers, compliance is given weight. (RFR at 11-12 – "These evaluations rank both on-field performance and 'the homework.' … Ultimately, PRO2 decides promotion and demotion decisions based on these evaluations.").

regulations] to take a [fitness] test … once a year." (Tr. 49:3). This testing process is facilitated by PRO (Tr. 149:11-14) and PRO requires the Petitioned-For Officials to complete this fitness test to be eligible to officiate. (Tr. 148:20). In addition, PRO requires the Petitioned-For Officials to comply with an ongoing fitness plan throughout each season, which includes among other things, requirements to perform workouts during the season. (Tr. 149:23). Petitioned-For Officials are required to track PRO-designed workouts throughout each season. (Tr. 150:8; 215:15). Additionally, PRO facilitates the Petitioned-For Officials' compliance with its required fitness program through provision of access to a smartphone application and website to report their fitness data. (Tr. 150:15). Moreover, the Petitioned-For Officials are required by PRO to submit results of fitness training at least twice per week. (Tr. 150:1; 150:1-18). The Petitioned-For Officials are *not* required to supply their fitness data, which includes both fitness monitoring and morning wellness checks, to NWSL, USL or MLS – only PRO. (Tr. 153:5; 218:3; 150:21-1518). PRO also maintains a specific COVID-19 policy, which contains health and safety protocol that must be followed by the Petitioned-For Officials. (Tr. 166:2-5; 59:18-22); (PX-10 at 4-7). This policy also includes a testing requirement and if a Petitioned-For Official does not comply with PRO's COVID testing policy they will be removed from their match assignment without pay. (Tr. 166:20).

PRO controls travel.[11] The Petitioned-For Officials' travel is coordinated through a "platform" designed and administered by PRO. (Tr. 68:11). PRO instructs the Petitioned-For Officials to contact PRO's designated travel agent for all travel and the agent, Sportscorp, arranges

[11] PRO's asserts that "[t]he leagues, and *not* PRO, establish … travel policies" and cites to the USL and NWSL travel policies. (RFR at 8); (PX-5); (PX-6). However, these travel policies are issued to the Petitioned-For Officials by PRO and distinctly include the PRO2 logo prominently displayed in the upper left-hand corner and include a PRO banner at the bottom of all pages.

airfare, hotel, and travel logistics. (Tr. 146:8; 213:17). When working either NWSL or USL matches for Respondent, the Petitioned-For Officials "fill out a template expense form … made available to [them] on PRO's shared electronic drive." (Tr. 156:3-8). When the Petitioned-For Officials work MLS matches for PRO, they "submit an expense report directly to PRO" and are "reimbursed directly by PRO..." (Tr. 160:25-161:3). Moreover, if any issues arise with "missing match fees" or "missing expenses", the applicable PRO handbooks require the Petitioned-For Officials to contact a specified PRO staff member depending on what league in which the match was worked. (Tr. 156:12); (PX-10 at 002); (PX-11 at 002). Notably, the Petitioned-For Officials do not contact the respective leagues for travel-related issues. PRO also requires the Petitioned-For Officials to wear PRO-provided track suits and polo shirts when traveling to and from matches or other PRO-required work. (Tr. 140:23-141:3).

PRO controls match day protocol and procedures. PRO maintains policies applicable to the Petitioned-For Officials, which set forth specific arrival and departure times into both the venue city and at the arena prior to working a match, and those same policies mandate that the Director of PRO2 Match Officials "will review deviations from these travel protocols." (PX-5 at 002); (PX-6 at 002). In addition, PRO requires the Petitioned-For Officials to engage in significant post-match work, which includes the drafting and submission of a "match report." (Tr. 81:18; 170:23-171:6). In addition, there are instances whereby the Petitioned-For Officials are instructed by PRO to submit a supplemental match report in draft form, which requires PRO's express approval prior to formal submission. (Tr. 171:14-16). The record also clearly established PRO instructs the Petitioned-For Officials on how they should officiate matches in the leagues assigned by PRO. (Tr. 148:13-15; 167:5). For example, in 2021, an issue arose in matches where players were kicking balls at their opponents. This on-field issue resulted in instructions from PRO to the

Petitioned-For Officials as to how to PRO wanted them to handle those types of incidents in future matches. (Tr. 167:11). PRO publishes detailed officiating instructions to the Petitioned-For Officials as part of their employment. (PX-12).

PRO Controls Evaluations and Assessments. PRO performs and issues mid-year and end-of-year evaluations for the Petitioned-For Officials. (Tr. 70:17; 176:4-6; 225:24-226:1). PRO maintains it "evaluates performance based on the LOTG as established by USSF and FIFA, and other standards set by the leagues." (RFR at 10). However, it admits to also analyzing performance based on metrics it created and uses with MLS-level bargaining unit officials "so that it may properly place officials within its Tier system." (RFR at 10). Furthermore, "PRO2 … breaks down the metrics based on the perceived needs of each Tier." (RFR at 10); *see also* (PX-31-002). While these evaluations are unquestionably based on Key Match Incidents (KMI) and LOTG, PRO admits "[p]roper action during a KMI is entirely based upon correct interpretation of the LOTG", an interpretation that PRO alone undertakes when it provides feedback, evaluations, and assessments to Petitioned-For Officials. (RFR at 10). In addition, the PRO2 committee meets twice a year to review the Petitioned-For Officials' performance. (Tr. 71:12). No evidence has been presented, nor does PRO assert, that the Leagues are involved in any way with the evaluations or PRO2 committee meetings. PRO Referee Coaches are designated by PRO to provide feedback to the Petitioned-For Officials (Tr. 175:2), and PRO requires the Petitioned-For Officials to complete and submit self-evaluations for each match they work for PRO. (Tr. 225:18-23; 177:19-22).

Compliance with self-evaluations is monitored and considered in mid-year and end-of-year evaluations. (PX-16-11); (PX-19-08). Furthermore, for all NWSL matches, the Petitioned-For Officials receive written and verbal feedback from PRO staff, or a designated referee assessor assigned by PRO. (Tr. 181:18). Similarly, PRO sends the Petitioned-For Officials written

assessments of their performance following each match worked. (Tr. 223:17). PRO also completes a written per-match evaluation or "match assessment" of the Petitioned-For Officials. (Tr. 119:8; 223:15).

PRO controls employee discipline. PRO responds, in disciplinary fashion, if a Petitioned-For Official "continually rejects assignments." (Tr. 67: 4-11). Moreover, Respondent's disciplinary authority over the Petitioned-For Officials is starkly illustrated by the documented demotion of an Assistant Referee over an alleged travel expense policy violation. (PX-27); (Tr. 228:4). The Assistant Referee was questioned by PRO management regarding the number of nights he stayed in a hotel when working a USL match assigned by PRO. (Tr. 228:1-6). The Assistant Referee was summoned to a disciplinary meeting with PRO managers (Tr. 228:10-11), during which PRO advised he was being demoted from a Tier A to a Tier B Assistant Referee because he allegedly violated the travel policy. (Tr. 228:20-21). Only PRO management (and nobody from USL) were present on the video call whereby the Assistant Referee was demoted, which was viewed as discipline. (Tr. 247:8; 230:14).

2. The Regional Director Correctly Determined that the Engaged in a Distinct Occupation Factor Supported a Finding that the Officials Are Employees.

The Regional Director properly determined the Petitioned-For Officials are engaged in a distinct occupation. The Regional Director relied upon the evidentiary record in support of this finding, including the facts that:

- The Petitioned-For Officials are required to wear PRO2 polo shirts upon arrival to a match and a PRO2 badge when officiating the match. As explained by the Regional Director, when the officials arrive to officiate a match, "it is plain to all observers that they do so under PRO2's name." (DDE at 8).
- The Petitioned-For Officials attend regular meetings with PRO2 coaches to improve on-field performance and the officials' own function is to officiate soccer matches. (DDE at 8).
- PRO exists to provide the best officiating for soccer matches and the Petitioned-For Officials' work is integral to that core function. (DDE at 8).

PRO's lone witness confirmed the Regional Director's finding with respect to PRO's core purpose and that the Petitioned-For Officials' work is integral to that core function:

> Q: Okay. And PRO2's mission statement is, quote, to identify, train and develop future professional match officials and provide quality officiating in the leagues to which we assign. Is that also accurate?
>
> A: That is. It's -- it's [sic] primary purpose is to provide future professional status officials, and while doing that at the same time is developing them is to provide a good service to those leagues that we are using as a vehicle to be able to do that, by assigning those officials.

(Tr. 115:18-116:1).

3. <u>The Regional Director Conservatively Determined that the Skill Required in the Particular Occupation Factor Was Inconclusive but Could Have Determined It Supported a Finding that the Officials Are Employees.</u>

Even though the Regional Director conservatively held this factor was inconclusive, there was ample evidence in the record that this factor also supported a finding of employee status. Significant skill is required in the Petitioned-For Officials' occupation. It was uncontested that the entire mission of PRO2 is to develop – through years of education, training, and experience – the skill of soccer officials for assignment to MLS games. Moreover, PRO's lone witness agreed, in no uncertain terms, that the skills of the Petitioned-For Officials include, among other things, the ability to manage participants, teamwork, ability to recognize all play, and a knowledge of the rules. (Tr. 102:7-11). PRO was formed for the purpose of administering a professional soccer referee program in the United States and to improve the quality of professional refereeing in North America through training [administered by the program]." (Tr. 115:17).

4. <u>The Regional Director Conservatively Determined that Supply of Instrumentalities Factor Was Inconclusive but Could Have Determined It Supported a Finding that the Officials Are Employees.</u>

The record demonstrated PRO provides and requires *uniforms* for the Petitioned-For Officials. For MLS matches worked, PRO provides a uniform to the Petitioned-For Officials (Tr.

75:5; 141:7), and when assigned as video replay officials in MLS, PRO requires them to wear PRO-provided track suits and polo shirts. (Tr. 140:21). For USL and NWSL matches, PRO provides a "PRO2 badge" to all Petitioned-For Officials (Tr. 76:14), which PRO "expect[s] them to wear..." (Tr. 104:3; 138:15; 208:1-5); (PX-3). In addition, PRO requires the Petitioned-For Officials to wear polo shirts when traveling to or from work for PRO in USL or NWSL matches (Tr. 138:3), which PRO admittedly provides. (PRO's PFR at 8). Moreover, PRO has documented the Petitioned-For Officials' uniform and dress code requirements, including the requirement to wear PRO2 badges. (PX-21); (Tr. 209:3); (PX-3). The record also showed PRO supplies "communication equipment" to the Petitioned-For Officials for use in PRO-assigned matches. (Tr. 77:24-78:13; 141:14-2:6; 209:14-21). In so doing, PRO arranged and paid for a specialized ear-mold fitting process to facilitate the Petitioned-For Officials' use of the on-field radio communication devices. (Tr. 142:12-23).[12] PRO also supplies certain Petitioned-For Officials with a PRO watch, a Polar GPS, and heartrate monitor. (Tr. 210:16-19; 79:10). PRO also provides the Petitioned-For Officials with all equipment necessary to perform work when assigned to video review. (Tr. 104:14).

5. <u>The Regional Director Conservatively Determined that the Length of Time Employed Factor Was Inconclusive but Could Have Determined It Supported a Finding that the Officials Are Employees.</u>

The Regional Director determined this factor was inconclusive, in part, because the "record does not reveal how long, on average, officials remain affiliated with PRO2." (DDE at 10). Moreover, despite citing a 20% annual turnover rate, it was noted the Petitioned-For Officials work

[12] PRO's assertion that this constitutes "minor audio equipment" (RFR at 14) is comical, as officiating would not be possible without the communication devices. Moreover, if the equipment were "minor", PRO would not have gone to the expense of and paid for the provisions of specialized ear-mold fittings for the Petitioned-For Officials.

a season that spans annually from April through November, which contrasts with *PIAA* where the lacrosse officials only worked a seven-week regular season and four-week postseason. (DDE at 10). However, the record could have supported a determination that this factor weighed in favor of an employee status finding. The record demonstrated some of the Petitioned-For Officials have been employed by PRO dating back to 2017. (Tr. 104:23). In addition, two of the Petitioned-For Officials testified they had been employed by PRO since 2015 and 2016 respectively. (Tr. 203:18; 131:7).

6. The Regional Director Conservatively Determined that the Method of Payment Factor Weighed Toward Independent Contractor Status but Could Have Determined It Supported a Finding that the Officials Are Employees.

Similar to *PIAA*, the Regional Director conservatively concluded method of payment weighed in favor of an independent contractor finding. However, the record could have supported a finding that this factor weighed toward employee status. PRO *pays the Petitioned-For Officials directly* for all MLS matches they are assigned. (Tr. 53:15; 53:25; 118:10). Moreover, for MLS matches worked, PRO provides the Petitioned-For Officials with an IRS form 1099 for taxation purposes. (Tr. 161:6; 161:19); (PX-36). For matches worked in leagues other than MLS, PRO is involved with the payment structure for the Petitioned-For Officials. PRO is involved in setting the annual rates paid to the Petitioned-For Officials for work in NWSL and USL through meetings with the respective leagues wherein PRO "advocates" and negotiates for rates of pay on behalf of PRO2 Officials. (Tr. 59:3; 108:5-11).

> [PRO] advocate[s] for the best possible number … for the league. We push the league [NWSL and USL] and say we think you should be paying this or whatever, understanding the time and effort that's put into [the Petitioned-For Officials'] development. So we do advocate. … there's some negotiation.

(Tr. 108:5-11). When Petitioned-For Officials work USL or NWSL matches they complete an invoice form provided by PRO. (Tr. 164:2). If there is an issue with payment of match fees or

expenses for any match, the Petitioned-For Officials are directed by Respondent to address the issue directly with PRO. (Tr. 165:19); (PX-10-002); (PX-11-002); (PX-30-002). Moreover, the Petitioned-For Officials do not receive the opportunity to negotiate the match fee rates, which are unilaterally set by PRO. (Tr. 182:12; 231:13; 232:9).

7. The Regional Director Correctly Determined that the Work in Question as Part of the Employer's Regular Business Factor Supported a Finding that the Officials Are Employees.

Despite PRO's arguments that officiating is not part of the business of soccer and that it does not need to assign officials to non-MLS games, the Regional Director correctly concluded this factor weighed in favor of employee status. The record amply supports this conclusion. In fact, there can be no reasonable dispute the Petitioned-For Officials' work is not only a part of PRO's regular business – it is core to PRO's existence. (Tr. 31:4-10; 30:21-23).

8. The Regional Director Conservatively Determined that the Parties' Belief of Master and Servant Relation Factor Was Inconclusive but Could have Determined it Supported a Finding that the Officials are Employees.

The Regional Director determined this factor was inconclusive because while the record demonstrated the Petitioned-For Officials' feeling that PRO "controls every aspect of their careers as officials" (DDE at 11), PRO took the contrary position. However, the record could have supported the conclusion that this factor supported a finding of employee status. The Petitioned-For Officials do no other tasks for PRO besides soccer officiating and soccer officiating related work. (Tr. 116:14). Moreover, testimony established, in no uncertain terms, that officials do not feel free to officiate any match without PRO's approval. (Tr. 133:11). Similarly, the record demonstrated PRO issues discipline through tier demotion (Tr. 230:14) and that officials consider Alex Prus, PRO2's Director, as their "boss." (Tr. 232:19). For this, and the litany of evidence discussed herein demonstrating PRO's control over their work lives, the Petitioned-For Officials rightfully believe a master-servant relationship exists between each Official and PRO.

9. The Regional Director Correctly Determined that the Entrepreneurial Opportunity Factor Supported a Finding that the Officials Are Employees.

The Regional Director correctly relied upon the evidence presented to determine the "record revealed no evidence that officials have any opportunity for entrepreneurial gain or loss while performing work through PRO." (DDE at 11). To support this finding, the Regional Director appropriately pointed to the following facts established in the record:

- The Petitioned-For Officials' match fees are fixed, and they cannot choose to work more matches than assigned or repeatedly refuse PRO assignments without consequences. (DDE at 11).
- The Petitioned-For Officials cannot officiate a soccer match more efficiently in hopes of working multiple matches in a single day. (DDE at 11).
- The Petitioned-For Officials are restricted, by PRO Policy, from officiating any other soccer match "during the 72 hours surrounding each PRO match." (DDE at 11).
- The Petitioned-For Officials are not allowed to officiate USL or NWSL matches "at any time unless those matches are assigned to them by PRO." (DDE at 11).
- The Petitioned-For Officials' compensation is not altered, in any way, by the level of officiating at any given match. (DDE at 11).

For these and other reasons contained in the record, the Regional Director correctly determined, in accordance with NLRB precedent, that this factor "weighs in favor of employee status." (DDE at 11).

[*Remainder of Page Intentionally Left Blank*]

CONCLUSION

The Petitioned-For Officials exercised their lawful rights, under the NLRA, to seek and secure collective bargaining representation, and voted overwhelmingly in favor of unionization. Yet, PRO continues with one roadblock after another, even threatening the Board, PSRA, and its employees with a refusal to bargain if it did not get its way. PRO, blinded by its anti-union animus, cannot respect the democratic will of its employees, in accordance with the Act, to be represented by PSRA.

For the reasons set forth herein and based on the record in this matter, PRO's Request for Review should be denied, in accordance with 29 CFR §102.67(d), as it fails to present any compelling reasons in support thereof.

Dated: December 20, 2021
White Plains, New York

SEHAM, SEHAM, MELTZ & PETERSEN, LLP

By: _____

Lucas K. Middlebrook, Esq.
lmiddlebrook@ssmplaw.com
Karen L. Bernstein, Esq.
kbernstein@ssmplaw.com
199 Main Street - Seventh Floor
White Plains, NY 10601
Tel.: 914-997-1346
Fax: 914-997-7125

Attorneys for Petitioner
PROFESSIONAL SOCCER REFEREES ASSOCIATION

CERTIFICATE OF SERVICE

A copy of the foregoing document, with any of its attachments, was personally served on the below date by email to:

John J. Walsh, Jr.
Regional Director
NLRB Region 2
26 Federal Plaza, Rm. 3614
New York, NY 10278-0104
Jack.walsh@nlrb.gov

National Labor Relations Board
1015 Half Street SE
Washington, D.C. 20570-0001
(by E-Filing)

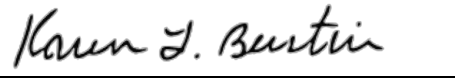
and

Mark Theodore
mtheodore@proskauer.com

Ethan Picone
epicone@proskauer.com

Attorneys for PRO

Dated: December 20, 2021



Karen L. Bernstein, Esq.